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IN THE SUPREME COURT OF THE UNITED STATES

SENATOR MITCH MCCONNELL ET AL.,

Appellants/Cross-Appellees,

v.

FEDERAL ELECTION COMMISSION ET AL.,

Appellees/Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF POLITICAL SCIENTISTS NORMAN J. ORNSTEIN, PH.D., ET AL. AS AMICI CURIAE SUPPORTING THE CONSTITUTIONALITY OF TITLE 1 OF THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002

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FEC v. *Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001).....16, 17, 18

FEC v. *National Conservative Political Action Committee*, 470 U.S. 480 (1985) 18

Georgia v. *Ashcroft*, 539 U.S. __, 123 S. Ct. 2498 (June 26, 2003).....5

Timmons v. *Twin Cities Area New Party*, 520 U.S. 351 (1997).....23-24

STATUTES AND CONGRESSIONAL MATERIAL

Federal Election Campaign Act, 2 U.S.C. § 431, et seq. ..... *passim*

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147 Cong. Rec. S2928 (daily ed. Mar. 27, 2001) (statement of Sen. Schumer).....27

147 Cong. Rec. S2940-41 (daily ed. Mar. 27, 2001) (statement of Sen. Feingold).....27

147 Cong. Rec. S3124-25 (daily ed. Mar. 29, 2001) (statement of Sen. Levin).....27

147 Cong. Rec. S3125 (daily ed. Mar. 29, 2001) (statement of Sen. Ensign).....20

147 Cong. Rec. S3125-26 (daily ed. Mar. 29, 2001) (statement of Sen. Clinton).....27

147 Cong. Rec. S3247 (daily ed. Apr. 2, 2001) (statement of Sen. Levin).....27

148 Cong. Rec. H347 (daily ed. Feb. 13, 2002) (statement of Rep. Serrano) 27

148 Cong. Rec. H348 (daily ed. Feb. 13, 2002) (statement of Rep. Costello) 27

148 Cong. Rec. H349 (daily ed. Feb. 13, 2002) (statement of Rep. Dingell).....27

148 Cong. Rec. H354 (daily ed. Feb. 13, 2002) (statement of Rep. Bentsen).....27

148 Cong. Rec. H409-410 (daily ed. Feb. 13, 2002) (statement of Rep. Shays).....27

148 Cong. Rec. H410 (daily ed. Feb. 13, 2002)
(statement of Rep. Kleczka).....27

148 Cong. Rec. H445(daily ed. Feb. 13, 2002)
(statement of Rep. Levin) 27

148 Cong. Rec. S2112 (daily ed. Mar. 20, 2002)
(statement of Sen. Schumer).....27

148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002)
(statement of Sen. McCain) 27

148 Cong. Rec. S2155 (daily ed. Mar. 20, 2002)
(statement of Sen. Dodd) 27

OTHER AUTHORITIES

John H. Aldrich, *Why Parties? The Origin and Transformation of Political Parties in America* (1995) 8

Angus Campbell, Philip E. Converse, Warren E. Miller, & Donald E. Stokes, *The American Voter* (New York: Wiley, 1960) 10

Inside the Campaign Finance Battle (Anthony Corrado, Thomas E. Mann & Trevor Potter eds., 2003) 8, 9, 11, 13, 14, 22

Alan Gerber & Donald Green, *The Effects of Canvassing, Direct Mail, and Telephone Contact on Voter Turnout: A Field Experiment,* American Political Science Review, vol. 94 (2000).....13

Donald Green, Alan S. Gerber & David Nickerson, *Getting Out the Youth Vote in Local Elections: Results from Six Door-to-Door Canvassing Experiments* (May 2002).....13

Marjorie Randon Hershey & Paul Allen Beck, *Party Politics in America* (10th ed. 2003) 9

Craig B. Holman & Luke P. McLoughlin, *Buying Time 2000: Television Advertising in the 2000 Federal Elections* (Brennan Center for Justice, N.Y.U.L. Sch.) *available at* http://www.brennancenter.org/programs /buyingtime2000.html.....3

William J. Keefe, *Parties, Politics, and Public Policy in America* (7th ed. 1994)..... 8

William J. Keefe & Mark J. Hetherington, *Parties, Politics, and Public Policy in America* (9th ed. 2003) 8, 9

V.O. Key, Jr., *Politics, Parties, and Pressure Groups* (New York: Crowell, 1964 6-7

The Federalist No. 10 (James Madison), *available at* http://www.constitution.org/fed/federa10.htm 7

The Federalist No. 57 (James Madison or Alexander Hamilton), *available at* http://www.constitution.org/fed/federa57.htm 29

L. Sandy Maisel, *Parties and Elections in America: The Electoral Process* (3d ed., Rowman & Littlefield, 2001) 7, 8

Warren E. Miller & The National Election Studies, American National Election Studies Cum. Data File, 1948-2000, *available at* http://www.icpsr.umich.edu/cgi/archive.prl?study=8475 10

Testimony before the Senate Comm. on Rules and Admin., 106th Cong. (Apr. 5, 2000) (statement of Michael C. Munger, Chairman-Designate, Department of Political Science, Duke University), *available at* http://rules.senate.gov/hearings/2000/04500munger.htm 2

Norman J. Ornstein, Thomas E. Mann, & Michael J. Malbin, *Vital Statistics on Congress* 2001-2002 (2002) 15

Clinton Rossiter, *Parties and Politics in America* (1960) 9

David Schultz, *Money, Politics and Campaign Finance Reform Law in the States* (Durham, NC: Carolina Academic Press, 2002) 15

Daniel M. Shay, *Transforming Democracy* (1995).....8

Press Release, "New Study Finds That Parties' Voter Mobilization Efforts Are Not Dependent on Soft Money" (July 3, 2002) (Brennan Center for Justice, N.Y.U.L. Sch.), *available at* www.bennancenter.org/presscenter/pressrelease_2002_070301.html 13

Statistical Abstract of the United States (U.S. Census Bureau, 2002), *available at* http://www.census.gov/prod/www/statistical-abstract-us.html 11-12

The NES Guide to Public Opinion and Electoral Behavior, The National Election Studies, Table 2a.3, *available at* http://www.umich.edu/~nes/nesguid/toptable/tab2a_3.htm..... 12-13

Center for Responsive Politics, National Party Totals, *available at* http://www.opensecrets.org/parties/dem hard.asp 21

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INTEREST OF AMICI CURIAE[1]

As political scientists who have studied and written extensively on political parties in the United States, we have a particularly strong appreciation for the vital role political parties play in our democratic system of governance. The view that parties are crucial to the American political system is widely shared in our field. "[I]t is no exaggeration to say that there is an emerging consensus among professional political

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[1] The names and academic affiliations of the political scientists filing as *Amici* are set forth in Appendix A. All parties have consented to the filing of this brief. No counsel for a party authored this brief, and no one other than the named *amici* and their counsel made a monetary contribution to its preparation and submission.

scientists that party is the most fundamental of all democratic institutions."[2]

We strongly disagree with the position taken by the Political Party Appellants ("Political Parties") in this case. They argue that the Bipartisan Campaign Reform Act of 2002, Pub. Law No. 107-155, 116 Stat. 81 ("BCRA"), by eliminating soft money, will destroy or severely weaken political parties. Political scientists have a substantial interest in the health of political parties, just as party officials do. But, unlike many party officials, who are heavily invested in the status quo or who have an ideological aversion to campaign finance reform, we are able to examine the abuses of the former system objectively and draw reasoned conclusions. We also can call upon a wealth of knowledge gained from an extensive body of highly respected research on political parties and the party system. Our studies and experience lead us to conclude that BCRA will strengthen, not weaken, political parties.

Under the previous campaign finance regime, political parties were diverted from their core functions by the allure of so-called "soft money." Ordinary party supporters were largely ignored while national party leaders, working closely with influential officeholders, solicited large contributions of soft money from corporations, unions, and wealthy individuals.

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[2] Testimony before the Senate Comm. on Rules and Admin., 106th Cong. 1 (Apr. 5, 2000) (statement of Michael C. Munger, Chairman-Designate, Department of Political Science, Duke University).

Opportunities for access to government insiders were often promised in return.

Starting with the 1996 election cycle, large amounts of soft money were used to pay for so-called "issue ads" that attacked specific candidates in targeted races. Far from educating voters on important issues, these ads were virtually indistinguishable from candidates' campaign ads. Indeed, the ads barely mentioned the name of the political party at all. Taking advantage of federal allocation formulas, national parties learned to stretch their soft dollars by funneling funds through various state and local party accounts in what amounted to a money-laundering operation.

SUMMARY OF ARGUMENT

Soft money and candidate-specific issue ads dramatically altered how political parties operated. National parties relied increasingly on a small number of very large contributions – some in the multi-million dollar range – from corporations, unions, and wealthy individuals. According to a study by the nonpartisan Center for Responsive Politics, two-thirds of all soft money contributed to the 2000 presidential campaign (nearly $300 million) came from a mere 800 donors.[3] This unhealthy dependence on a small number of very large donors raised serious concerns that these donors would exert undue influence on the officeholders who benefited from their contributions.

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[3] Craig B. Holman & Luke P. McLoughlin, *Buying Time 2000: Television Advertising in the 2000 Federal Elections* 78 (2001) (Brennan Center for Justice, N.Y.U.L. Sch.).

Although political parties have been part of the American political system for over two centuries, and although the soft-money phenomenon dates back little more than twenty years, the Political Parties flatly assert that the loss of soft money will leave them without sufficient resources to fulfill their critical functions. Indeed, they claim that BCRA, which has been in effect for less than a year, already has "undermin[ed] the ability of political parties to fulfill their pivotal role in American democracy." (Brief of the Political Parties at 32 (hereinafter "Pol. Par. Br.")). Happily, the facts refute these dire predictions. In the first six months of 2003, after BCRA had gone into effect, the six national party committees raised more "hard money" ($160 million) than they raised in hard and soft money *combined* in the comparable period in the last presidential election cycle ($138 million).

BCRA represents a necessary and appropriate response to the abuses resulting from widespread circumvention of federal campaign finance laws. BCRA does not impose an expenditure limit and does not add *any* limits on the amount of money that can be spent by political parties. Instead, it requires that party funds be raised in compliance with a federal statutory and regulatory regime aimed at preserving the integrity of federal elections. BCRA §§ 323(a), 323(b). Contrary to the Political Parties' assertions, BCRA does not prevent parties from pooling resources or otherwise associating with each other. Nor does BCRA impermissibly intrude upon state control of local elections.

Nobody has more of a stake in a vibrant party system than the members of Congress and the President of the United States. It simply is not reasonable to think that the 300 Representatives and Senators who voted for BCRA, and the President who signed it into law, would support a measure that threatened to impair the effectiveness of the political parties.[4] To the contrary, in enacting BCRA, Congress sought to eliminate the potentially corrupting influence of soft money and to liberate political parties from an unhealthy dependence on a small number of large donors. Once parties no longer function as the mere conduits of unregulated and potentially corrupting soft money, public confidence in the political system will be restored. Grassroots initiatives of the kind for which political parties are best known will be reinvigorated. Individual voters will once again be the central actors in our political system.

While it is true that the soft money regime required coordination among the national and state political parties to avoid the limitations imposed by the

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[4] *See generally Georgia* v. *Ashcroft*, 539 U.S. __, 123 S. Ct. 2498 (June 26, 2003) (giving significant weight to the nearly uniform support shown by the minority legislators most directly affected by a legislative redistricting plan submitted by the State of Georgia for approval under the Voting Rights Act and observing that the minority legislators were in the best position to know how the redistricting plan would affect them). Members of Congress are directly affected by, and have special knowledge of and experience with, campaign finance regulation. Just as the Court accorded great weight to the minority legislators in *Georgia* v. *Ashcroft*, the Court should defer to the view of a majority of the members of Congress who voted for BCRA.

federal election laws existing at that time, this brotherhood of circumvention is hardly the type of associational interest protected by the Constitution. The First Amendment right of association has never been interpreted to include the right of an *entity*, like a political party, to associate with other entities for the purpose of evading regulatory constraints aimed at reducing invidious political corruption.

Moreover, nothing in BCRA will impair the ability of the national and state parties to work together just as effectively as they did under prior law to build common platforms, facilitate get out the vote efforts, build party membership, hold party conventions, field candidates for election at all levels of government, develop party strategies, and fashion enduring internal party structures. Indeed, the elimination of soft money will promote more party-strengthening activities at all levels of the party system.

ARGUMENT

I. Political Parties Are An Enduring and Indispensable Part of the American Political System.

America may have been conceptualized as a "government of and by the people," but, as V.O. Key, Jr., one of the most prominent political scientists of the twentieth century, observed: "[T]he machinery of popular government [did not] come into existence

overnight. By a tortuous process party systems came into being to implement democratic ideas."[5]

Political parties began to emerge soon after the Republic was formed. Their development was not without controversy. James Madison, for example, expressed concern that political parties would degenerate into competing factions, dividing and destabilizing the new nation.[6] "While [the founders] were loath to endorse the concept of political parties—because [parties as we know them] had yet to be devised—they did perceive the need to organize those who shared their views in order to succeed with this new form of government they had established. In their efforts to make our democracy work, they invented the political institution that suited their needs [the modern political party.]"[7]

Eventually Madison satisfied himself that our Constitution contained sufficient safeguards to control the potentially dangerous consequences of political factions. Not long after Alexander Hamilton put together a voting majority that would later become the Federalists, Madison joined with Jefferson in organizing an opposing party. Thus, by the Third Congress, federal officeholders "were divided into two recognizable, broad, intersectional alliances" that

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[5] V.O. Key, Jr., *Politics, Parties, and Pressure Groups 2000-01* (New York: Crowell, 1964).
[6] The Federalist No. 10 (James Madison).
[7] L. Sandy Maisel, *Parties and Elections in America: The Electoral Process* 33 (3d ed., Rowman & Littlefield, 2001).

contained "many of the elements we identify with political parties today."[8]

From their beginning, parties served an important role in our political system. Parties link individuals with their government, represent and integrate the interests of party members, and control and direct government.[9] Parties mobilize the electorate and streamline voters' electoral choices.[10] In short, parties serve as the medium through which average citizens find their place in our democratic system of government.[11] Parties also serve as a forum for aggregating public policy preferences and diluting the influence of organized special interests.[12] In this manner, parties facilitate the solidification of political

[8] John H. Aldrich, *Why Parties? The Origin and Transformation of Political Parties in America* 82 (1995); *see generally id.* at 79-82. The two-party system has exerted the control Madison anticipated. Through political parties, competing groups coordinate policy positions and aggregate influence under a single umbrella, thereby facilitating majority-building and the growth of political power. The process by which groups come together under the umbrella of political parties enlarges and refines public discourse and creates the stability Madison and others deemed necessary to successful democratic government.

[9] William J. Keefe & Mark J. Hetherington, *Parties, Politics, and Public Policy in America* 2-3 (9th ed. 2003). *See also* Maisel, *supra* note 7, at ch. 3.

[10] William J. Keefe, Parties, Politics, and Public Policy in America 33 (7th ed. 1994); Aldrich, *supra* note 8, at 288.

[11] Daniel M. Shea, *Transforming Democracy* 9-10 (1995).

[12] *Inside the Campaign Finance Battle* 30 (Anthony Corrado et al. eds., 2003).

power and the stabilization of our democratic government.[13]

On a more practical level, parties provide important services to the electorate. They develop party leadership, recruit and groom candidates, assist with voter registration, attract party members through grassroots political outreach and other means, and get voters to the polls.[14] Parties formulate policy and craft party platforms, providing party members with a coherent political view to serve as a guidepost in their political activities.[15] Moreover, stiff competition between the political positions of the major parties "produces public policy more in keeping with the preferences of the electorate."[16] Good party leadership understands the importance of building party loyalty. Indeed, "[f]ew factors are of greater importance for our

[13] Marjorie Randon Hershey & Paul Allen Beck, *Party Politics in America* 11 (10th ed. 2003).

[14] Corrado, *supra* note 12, at 30.

[15] Hershey & Beck, *supra* note 13, at 12-13. Political scientist Clinton Rossiter provides two historical examples of how parties shaped and informed important public debate. He cites the role of the Republican Party, through President Lincoln, in educating the nation about the nature and implications of slavery, and the role of the Democratic Party, through President Franklin Roosevelt, in seeking to educate the public about the relationship of private enterprise and public authority. *See* Clinton Rossiter, *Parties and Politics in America* 48 (1960).

[16] Keefe & Hetherington, *supra* note 9, at 55 & n.31 (citing Charles Barrilleaux, "Party Strength, Party Change and Policy-Making in the American States," *Party Politics* vol. 6, no. 1, at 61-73 (2000)).

national elections than the lasting attachments of tens of millions of Americans to one of the parties."[17]

Political scientists are not against party fundraising. In fact, to the extent that fundraising is a means of strengthening the electorate's attachment to political parties, we fully support party fundraising activities. But fundraising is a means to an end. The end is making sure that the parties can engage and mobilize voters, select and elect candidates, promote the parties' viewpoints, and facilitate governance. If we evaluate fundraising efforts in recent election cycles based on whether they served these purposes, the pre-BCRA regime would have to be judged an abject failure. During the same period that corporations and unions were contributing huge sums of soft money to political parties, the number of individual Americans who reported contributing to election campaigns declined by nearly 50 percent.[18] In 1976, 16 percent of Americans stated that they contributed to a campaign; in 2000, only 9 percent of Americans did so.[19]

II. Soft Money Has Done More to Harm Political Parties Than to Help.

Contrary to the Political Parties' assertions, the elimination of soft money will not diminish the ability of political parties to carry out their crucial democratic

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[17] Angus Campbell et al., *The American Voter* 121 (New York: Wiley, 1960).
[18] Warren E. Miller & The National Election Studies, American National Election Studies, Cum. Data File, 1948-2000.
[19] *Id.*

functions. Indeed, the preponderance of the research in this area affirms that soft money did not strengthen, and indeed harmed, political parties.

As one scholar has noted: "[S]oft money doesn't really make the parties strong; it makes the people who bring soft money to the party strong."[20] Over the past twenty years, hard and soft money contributions have accelerated at a dizzying rate. The increases in soft money contributions have been particularly staggering, growing from a mere $20 million in 1980 to nearly $500 million in 2000.[21] If soft money had the party-building powers that critics of BCRA attribute to it, one would expect to see impressive gains over the past ten to twenty years in such indicia of party strength as electoral competition,[22] party identification, and voter turnout. Quite the opposite is true.

In the soft money era, electoral competition actually *decreased*. In 1976 and 1978, the last two elections before parties began their pursuit of soft money, House incumbents won reelection in 95.8 percent and 93.7 percent, respectively, of their races. In both 1998 and 2000, two of the last elections conducted under the soft-money system, House incumbents won 97.8 percent of their races.[23] For Senate incumbents, the reelection rates in 1976 and 1978 were 64 percent

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[20] Corrado, *supra* note 12, at 53 (citing statement by Robin Kolodny, *CFI "Cyber-Forum": How Would McCain-Feingold Affect the Parties?*).
[21] Corrado, *supra* note 12, at 27.
[22] Statistical Abstract of the United States, Table No. 381 (U.S. Census Bureau, 2002).
[23] *Id.*

and 60 percent, respectively; these rose to 89.7 percent and 79.3 percent, respectively, in 1998 and 2000.[24] As these figures indicate, soft money increases have done nothing to counter or reduce the advantages of incumbency. And in the 2002 midterm congressional elections, when soft money was surging at high tide, only four House incumbents were defeated by challengers, the smallest number in U.S. history.

Soft money has also done nothing to reverse the downward trend in voter turnout figures since 1968.[25] In 1996, only 48.9% of the voting-age population cast ballots in the presidential election, the lowest rate ever recorded.[26] Thus, despite the millions of dollars of soft money raised by the parties in the 1980s and 1990s, there is absolutely *no* evidence that this money had any positive impact on voter turnout.[27]

Similarly, survey data show no appreciable increase in the strength of party identification. Based on the seven-point scale developed by the National Election Studies (NES), which has been the academic measure of partisanship for fifty years, the strength of party attachments did not materially increase in the past decade.[28] Individuals who identified themselves as strong Democrats or Republicans accounted for about 29 percent of respondents in 1992 and 31 percent in

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[24] *Id.*
[25] Statistical Abstract of the United States, Table 395.
[26] *Id.*
[27] *Id.*
[28] The NES Guide to Public Opinion and Electoral Behavior, *The National Election Studies*, Table 2a.3.

2000. These figures are typical of the results for the past five decades.[29]

These declines in traditional measures of party strength are a reflection of the fact that soft money was not used to support party-building activities.[30] In the 2000 campaign, only eight cents of every soft-money dollar spent by the state parties went to voter education, phone banks, voter registration, get-out-the-vote drives, and other traditional party-building activities.[31] Moreover, when money was made available to state and local organizations for voter mobilization efforts, it was used primarily for direct mail and telephone banks. Very little was used to fund direct personal contact with voters, despite research showing that face-to-face campaigning is far more effective than phone banks and direct mail in stimulating voter turnout.[32]

Much more of the soft money raised by national parties and transferred to state parties was devoted to television advertisements touting federal candidates. These advertisements rarely mentioned parties by

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[29] *Id.*
[30] Corrado, *supra* note 12, at 109.
[31] *Id.* at 32 & n.36; Press Release, "New Study Finds That Parties' Voter Mobilization Efforts Are Not Dependent on Soft Money" (July 3, 2001) (Brennan Center for Justice, N.Y.U.L. Sch.).
[32] *See* Corrado, *supra* note 12, at 111; *see also* Alan Gerber & Donald Green, *The Effects of Canvassing, Direct Mail, and Telephone Contact on Voter Turnout: A Field Experiment* 653-63, American Political Science Review, vol. 94 (2000); Donald Green, Alan S. Gerber & David Nickerson, *Getting Out the Youth Vote in Local Elections: Results from Six Door-to-Door Canvassing Experiments* (May 2002).

name, except for a perfunctory acknowledgement that the advertisement was "Paid for by the [Democratic or Republican] National Committee." Candidates, on the other hand, were identified by name in virtually all of the ads, and opponents were mentioned by name in a high percentage of ads. Thus, soft money became the mechanism by which parties conducted candidate-centered advertising campaigns which, ironically, had the effect of weakening the link between parties and candidates in the public mind.

The preponderance of the evidence from recent research suggests that the exponential growth in soft money has also compromised political parties' ability to fulfill their traditional role in the American political process. The soft-money regime brought elected officials and large private donors together. High-ranking elected officials were often involved in raising large amounts of soft money.[33] These officials then dominated the national party committees, exerting a determinative influence in deciding how these resources would be allocated in presidential and congressional elections. In this race toward national party prominence, any semblance of state party independence was lost. Instead, national parties used state parties primarily as vehicles for advancing federal election campaign objectives, thereby turning political parties into money launderers for individual candidates.[34]

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[33] *See* Corrado, *supra* note 12, at 28-29.

[34] A study examining elections in twelve states concluded that state parties were conduits for special interest money, a practice that often had a dramatic and adverse impact upon state party and legislative caucus leaders, competitiveness of races, the strength of incumbency, and the shaping of policy. David Schultz, *Money, Politics and Campaign Finance Reform Law in the States*, (Durham, NC: Carolina Academic Press, 2002).

Put simply, the vast increases in soft money fundraising over the past twenty years have had no positive effect on traditional measures of party strength and have, in fact, coincided with an electoral era marked by measurable and significant decreases in electoral competition, party identification, and voter turnout. This research indicates that soft money, if anything, has had a corrosive effect on party strength, local party affiliation, and party loyalty among voters. The national parties chose to spend far more money promoting federal candidates – largely by sponsoring issue ads – than investing in party-building activities at any level. There is no reason to believe that these priorities would change if BCRA's soft money ban were to be held unconstitutional.

III. BCRA Will Not Have the Dire Consequences for Political Parties That Opponents of BCRA Predict.

The Political Parties' doomsday predictions for the fate of political parties under BCRA is both fanciful and inconsistent with the historical development of campaign finance regulation. Modern campaign finance reform began in earnest in the wake of the Watergate scandal.[35] Since that time, various regulatory regimes have been enacted, but experience

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[35] Norman J. Ornstein, Thomas E. Mann & Michael J. Malbin, *Vital Statistics on Congress 2001-2002*, at 12-13 (2002).

"demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced." *FEC* v. *Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 457 (2001) (hereinafter "Colorado Republican II").

BCRA is the culmination of Congressional efforts to impose reasonable contribution limits on political parties. BCRA's restrictions on soft money contributions, coupled with its increases in hard money contribution limits, will not work any real hardship on political parties, which have proven themselves remarkably resilient when raising funds to further their political aims. Instead, limits on soft money contributions will restore balance to parties' fundraising efforts, which in recent years have come to be dominated by wealthy donors who seek to buy access along with their contributions.

Specifically, the Political Parties assert that Title I will harm political parties in several ways: (1) by limiting the amount of money political parties can spend; (2) by frustrating fundraising efforts; (3) by disrupting essential party functions; and (4) by intruding upon state and local affairs. This parade of horribles vastly distorts the text of BCRA and mischaracterizes BCRA's likely effect. Moreover, these contentions completely ignore provisions in BCRA that strike a balance between the interests of political parties, on the one hand, and the competing

need to protect the integrity of federal elections and federal policy decisions, on the other.

A. BCRA Does Not Impose Any Limits on Spending.

Despite the Political Parties' assertions to the contrary (Pol. Par. Br. at 39), BCRA does not impose *any* limit on the amount of money parties can spend. Instead, BCRA simply requires national political parties to use funds that are legal under federal law. BCRA §§ 323(a), 323(b). Similarly, BCRA requires state political parties, when they choose to spend money on activities that affect federal elections, to use funds that are legal under federal law. BCRA § 323(a), 323(b)(2)(c). BCRA's focus is on the *kind* of money that can be used for activities that affect federal elections, not on *how much* money political parties can spend. This is not a spending limit any more than were the contribution limits upheld in *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

BCRA is a mechanism to assure that when national and state parties spend money that affects federal elections, they only spend money raised in compliance with federal law. BCRA accomplishes this objective in a manner that is well within the powers accorded to Congress under the Constitution. BCRA has the additional effect of preventing party circumvention of federal law, a laudatory goal cited in a long line of Supreme Court campaign finance cases. *See, e.g., Colorado Republican II*, 533 U.S. at 456 &

n.18; *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 664 (1990).

Indeed, Congress has the power to regulate campaign contributions precisely because of the unique threats such contributions pose to the integrity of federal elections. As the Court has long recognized, campaign contributions carry with them a risk of corruption and the perception that access to and influence over federal officials are for sale to the highest bidder. *See Buckley*, 424 U.S. at 26-28 (noting that campaign contribution limits are needed to counter both the appearance and the reality of corruption); *Colorado Republican II*, 533 U.S. at 440-41 ("[L]imits on contributions are more clearly justified by a link to political corruption than limits on other kinds of . . . political spending are (corruption being understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence") (citation omitted); *FEC* v. *National Conservative Political Action Committee*, 470 U.S. 480, 496-97 (1985) (recognizing the need to "preven[t] corruption or the appearance of corruption").

B. BCRA Will Not Frustrate Party Fundraising Efforts.

The new restrictions imposed on soft money will not impair the parties' ability to raise funds sufficient to conduct and coordinate their campaigns, as the Political Parties contend. Indeed, numerous provisions in BCRA show that Congress took the financial interests of political parties into account in

crafting the new regulatory scheme. As a result of the sensitivity shown by Congress, parties may find that their ability to raise funds has been enhanced by BCRA.

First, BCRA actually *raises* the limits on hard money contributions that individuals may make. Under BCRA, the amount individuals may contribute in hard money doubles, from $1,000 per candidate per election to $2,000 per candidate per election. BCRA § 307(a)(1). Likewise, the amount individuals may contribute to national party committees and state or local party committees also increases. In the case of national party committees, individuals may now contribute $25,000 per year, up from $20,000 pre-BCRA. BCRA § 307(a)(2). In the case of state or local party committees, individuals may now contribute $10,000 per year, an increase of $5,000 over previous limits. Moreover, the aggregate limit on individual contributions under BCRA is now $95,000 per two-year election cycle, almost twice the $25,000 per year formerly allowed. BCRA §§ 307(b)(3)(A), 307(b)(3)(B). Of this $95,000, only $37,500 may be contributed to candidates over a two-year election cycle, leaving $57,500 reserved for contributions to the political parties or other political committees.

BCRA also eliminates a provision of the earlier law that set up a painful either/or competition between parties and their candidates. Under the previous law, individuals could contribute $25,000 per year overall, with up to $20,000 of that amount going to national parties—but if an individual gave, say $15,000 to candidates, he could contribute only $10,000 to parties.

As these figures illustrate, BCRA will allow political parties to raise considerably more hard money, which can in turn be used for any purpose the parties choose, including direct advocacy on behalf of a specific candidate.

Second, the Levin Amendment allows state and local parties to use limited soft money, as long as such money is legitimately used for grassroots activities like voter registration and get-out-the-vote (GOTV) campaigns. Under the Levin Amendment, state and local parties may raise up to $10,000 per contributor per year to fund voter registration and GOTV drives. BCRA § 323(b)(2)(B)(iii). As the floor debate on the Levin Amendment attests, Congress crafted the Amendment to allow state parties to conduct voter mobilization activities consistent with state law, while also protecting the federal election process from soft money abuses (often occurring through state parties).[36] In fact, the Levin Amendment was inserted into the campaign finance reform bill in response to criticism that the bill did not give state and local parties the leeway needed to raise money for grassroots voter activities.

Thus, the Political Parties are simply wrong when they complain that, in enacting BCRA, Congress failed to give "any meaningful consideration to the

[36] *See, e.g.*, 147 Cong. Rec. S3125 (daily ed. Mar. 29, 2001) (statement of Sen. Levin) ("This amendment is aimed at restoring the appropriate use by parties of non-Federal funds which are obtained by those parties in compliance with their own State laws in [voter registration and GOTV activities].").

impact of BCRA" on state and local parties. (Pol. Par. Br. at 63).[37] The Levin Amendment is a measured approach that addresses state parties' legitimate concerns about raising money for local voter mobilization activities while recognizing the danger inherent under the previous regime, in which state parties were used as tools to circumvent federal fundraising regulations.

Third, evidence to date indicates that parties are having no difficulty raising increasing amounts of hard money to compensate for the restrictions on soft money imposed by BCRA. The national parties have raised more hard money in the first six months of the current year – $160 million during the period January 1 to June 30, 2003 – than the national parties raised in combined *hard and soft money* in the six-month period at the comparable stage of the last presidential election cycle – $138 million from January 1 to June 30, 1999.[38]

Just as they have done in the past (and are currently doing under BCRA), the parties will adapt to the new regulations and will continue to raise money in amounts that eclipse earlier fundraising levels. Indeed, if the current year is any indication, political parties will emerge from the hold of soft money with more funds to use on party-building and campaign activities, and federal politicians will be liberated from the burden of

[37] *See also infra* note 42 (citing numerous portions of congressional debate specifically referencing BCRA's effect on state and local party committees).

[38] Center for Responsive Politics, National Party Totals.

raising soft money to finance campaigns in the small number of targeted races.

To project that parties will suffer a loss of revenue equal to the soft money previously taken in is to assume that parties will do nothing to recoup these losses, which is absurd. Parties will take advantage of the higher contribution levels for hard money and will broaden their donor base. The dramatic increase in hard-money fundraising in the past decade leaves little doubt that this can be achieved.[39]

Banning soft money in federal elections, far from weakening parties, will make them stronger. To attract the new donors and supporters that they will need, parties will be forced to engage in more personal contact with voters, develop policy positions and party platforms that will inspire new members, make greater use of volunteer services, and reduce the reliance on purchased services.[40]

Finally, even if BCRA were to have some negative effect on party fundraising, the positive trade-off would be the restoration of balance to the campaign fundraising process. Under the pre-BCRA regime, political candidates were held hostage by an unremitting pressure to keep up with opponents whose campaigns benefited from the expenditure of huge amounts of soft money. BCRA amounts to a "nonproliferation treaty," helping to curb the campaign fundraising "arms race." If BCRA is left standing, it

[39] Corrado, *supra* note 12, at 108.
[40] *Id.* at 110.

will prove a successful deterrent to soft money abuses and restore integrity to the political process.

C. BCRA Imposes No Unconstitutional Restraint on the Associational Rights of National and State Parties.

Political parties enjoy numerous First Amendment protections, but the right to engage in collaborative action to circumvent legitimate regulation of campaign funds that affect federal elections is not among them. To hold BCRA unconstitutional because it bans organizational collaborations intended to evade federal campaign laws would represent an unprecedented extension of the First Amendment's scope. This Court has never held that the right to freedom of association encompasses the right of distinct *organizations* to associate with each other as organizations. To the contrary, the Court's opinions reflect that what is protected is the right of an organization's *members* to associate with each other and to act collectively. Even were it otherwise, the limited restriction BCRA imposes on what is, in effect, joint political money laundering is not sufficiently burdensome to outweigh significant governmental interests in protecting the integrity and fairness of the election process and in advancing public confidence in that process.[41] *Cf. Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351 (1997) (Minnesota's refusal to

[41] The Republican National Committee has no more right to associate with a state entity for the purpose of political money laundering than Exxon has to associate with Texaco to advance a price fixing scheme.

allow party to nominate candidate already selected by another party impaired, but not unconstitutionally, the party's freedom of association).

Moreover, the Political Parties greatly exaggerate BCRA's effect on the ability of state and national party committees to work together. (Pol. Par. Br. at 34, 40, 59, 60.) Contrary to what the Political Parties imply about cooperative activities, such as "coordinated campaigns" and "victory plans," BCRA does not preclude state and national party committees "from both affiliating . . . and from pooling their resources with each other." (*Id.* at 60). State and national party committees are free to work together, without any limitation whatsoever, in soliciting and spending money raised in compliance with federal law ("federal funds"). State and national parties may also engage in joint campaign strategy discussions and other coordinated activities in connection with the spending of Levin Amendment money, as long as the national party is not involved in soliciting the Levin money and does not control how the Levin funds are spent. National party officials may also raise federal funds for state parties and state candidates. Moreover, state parties may work jointly with one another in raising, transferring and spending nonfederal funds for activities that do not constitute federal election activity.

National, state, and local parties may still work together to build common platforms, to facilitate get out the vote efforts, and to fashion internal party structures and strategies. State and national parties may still coordinate their activities and engage in joint projects

for the welfare of the party or the candidates they support. BCRA does not prevent the joint expression of views by national and state parties, the joint selection of candidates, or the joint pursuit of common political ends. Nor does BCRA affect the ability to recruit and field successful candidates at all political levels, engage in issue advocacy, or hold party conventions. Indeed, by placing a greater premium on diffuse fundraising efforts, BCRA creates tremendous incentives for increased cooperation between state and national parties. These incentives will result in *stronger* local parties, which will no longer serve merely at the behest of their national affiliates.

In short, BCRA leaves plenty of room for association and discourse among political parties at all levels. Of course, the Political Parties' speech and association argument is not really about the First Amendment at all. As the carefully selected examples in their brief make clear (Pol. Par. Br. at 34, 40, 59, 60), what they are really challenging is the power of Congress to extend its legislative reach to activities at the state or local level that affect federal elections. This Court has already held that Congressional power extends that far. *See Buckley* v. *Valeo*, 424 U.S. 1 (1976).

D. BCRA Does Not Intrude Unconstitutionally Upon State and Local Affairs.

The Political Parties argue that BCRA's definition of "Federal election activity," 2 U.S.C. § 431

(20), is too broad and impermissibly intrudes upon areas properly subject only to state and local regulation. (Pol. Par. Br. at 51.) This argument does not square with the relevant statutory language or this Court's election law precedents. Congress has long applied federal campaign finance rules to state party funds that are spent on activities affecting federal elections.

BCRA's definition of "Federal election activity" does not interfere with "virtually all political activity conducted by state or local parties," even when state elections are held at the same time as federal elections, as the Political Parties claim. (Pol. Par. Br. at 51.) BCRA does not limit the ability of state and local parties to engage in activities that affect only state or local elections, even in federal election years. State parties are free to use unlimited amounts of their nonfederal funds to make contributions to state and local candidates; to run campaign ads in support of state and local candidates (as long as the communications are not otherwise voter mobilization activities); to hold state or local party conventions; and to distribute grassroots campaign materials that name only state or local candidates. *See* 2 U.S.C. § 431(20)(B)(i)-(iv). State and local parties may also spend nonfederal funds for other activities, for example, voter registration activities prior to 120 days before a federal election, services of staff who devote less than 25 percent of their time to federal activities, and all party administrative costs.

The Levin Amendment, discussed above, shows that Congress was sensitive to party resource concerns.

The Political Parties seek to minimize the significance of the Levin Amendment, denying that it provides clear evidence that Congress did in fact give "meaningful consideration to the impact of BCRA" upon state and local parties. (Pol. Par. Br. at 63.) However, the floor debate on the Amendment and other debate show that Congress carefully considered BCRA's impact on state parties.[42] The Levin Amendment is structured to increase state party resources for voter mobilization activities, while avoiding the soft-money abuses of the past. The language in the Levin Amendment that requires states to raise their own Levin funds and not to use funds transferred from other party committees is an example of Congress' determination to avoid such abuses. *See* BCRA § 323(b)(2)(B)(iv). Contrary to the Political Parties' portrayal of this language (Pol. Par.

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[42] *See, e.g.*, 148 Cong. Rec. S2155 (daily ed. Mar. 20, 2002) (statement of Sen. Dodd); 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain); 148 Cong. Rec. S2112 (daily ed. Mar. 20, 2002) (statement of Sen. Schumer); 148 Cong. Rec. H445 (daily ed. Feb. 13, 2002) (statement of Rep. Levin); 148 Cong. Rec. H410 (daily ed. Feb. 13, 2002) (statement of Rep. Kleczka); 148 Cong. Rec. H409-410 (daily ed. Feb. 13, 2002) (statement of Rep. Shays); 148 Cong. Rec. H354 (daily ed. Feb. 13, 2002) (statement of Rep. Bentsen); 148 Cong. Rec. H349 (daily ed. Feb. 13, 2002) (statement of Rep. Dingell); 148 Cong. Rec. H348 (daily ed. Feb. 13, 2002) (statement of Rep. Costello); 148 Cong. Rec. H347 (daily ed. Feb. 13, 2002) (statement of Rep. Serrano); 147 Cong Rec. S3247 (daily ed. Apr. 2, 2001) (statement of Sen. Levin); 147 Cong. Rec. S3125-26 (daily ed. Mar. 29, 2001) (statement of Sen. Clinton); 147 Cong. Rec. S3125 (daily ed. Mar. 29, 2001) (statement of Sen. Ensign); 147 Cong. Rec. S3124-25 (daily ed. Mar. 29, 2001) (statement of Sen. Levin); 147 Cong. Rec. S2940-41 (daily ed. Mar. 27, 2001) (statement of Sen. Feingold); 147 Cong. Rec. S2928 (daily ed. Mar. 27, 2001) (statement of Sen. Schumer).

Br. at 34), it does *not* prohibit collaboration among state, county, and local party committees in connection with the spending of Levin funds.

The requirement that parties spend a mixture of federal and nonfederal funds on voter mobilization activities that affect both federal and state elections is nothing new, as the Political Parties acknowledge. (Pol. Par. Br. at 10.) Allocation rules are an important means of balancing the federal government's interest in protecting the integrity of federal elections and the states' interest in setting their own campaign finance rules for state elections. However, the old allocation rules had provided a gaping loophole for soft money and were badly in need of revision. BCRA now requires that state parties fund voter mobilization activities with federal funds if a federal candidate is named, or with a combination of federal money and Levin money in other circumstances.

IV. Political Parties Will Flourish Under BCRA.

Through BCRA, Congress has laid the foundation for a renewed emphasis on individual participation in political parties. The soft money ban does not prevent parties from raising money; it simply requires them to raise money, up to the more lenient hard money contribution limits, from a greater number of individual contributors. Parties will quickly discover how to maximize contributions in ways that are consistent with the changes in the law. This will almost certainly entail a greater reliance on grassroots activities and less emphasis on candidate-specific issue

ads, a development that would actually strengthen parties.

BCRA will also result in increased electoral competitiveness. The explosion of party-funded television ads has sharply increased broadcast costs, to the particular disadvantage of challengers. Not only do high advertising costs make it difficult for challengers to gain the necessary name recognition that it takes to wage a successful challenge, but the abundance of ads makes it difficult for challengers to get their message across to viewers. BCRA helps correct this imbalance by restricting the soft money formerly used to finance such ads.

BCRA promises a new age of strength for political parties. With the soft money loophole firmly closed, unregulated financial donations from corporations, unions, and wealthy donors will no longer be allowed to taint the political process with the suggestion of impropriety. Instead, candidates and parties will return to their traditional focus on party-building. This renewed focus will make the parties more receptive to the needs of individual voters and do much to restore confidence in the integrity of the American political system.

CONCLUSION

For the foregoing reasons, the Court should sustain Title I of BCRA.

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APPENDIX A

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